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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

85-5386

SON H. FLEMING,

Petitioner,

vs.

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

UNITED STATES SUPREME COURT
CASE NO. _____

Eleventh Circuit Court
of Appeals
Case No. 83-8321

Habeas Corpus Death
Penalty Proceeding

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the issue of whether a capital defendant was represented by counsel at a critical stage of the prosecution against him is a mixed question of law and fact allowing broad appellate review or whether it is strictly a question of fact governed by the "clearly erroneous" standard of review.

2. Whether the District Court's holding that petitioner was represented by counsel at his committal hearing, a critical stage of the prosection, was clearly erroneous.

3. Whether a capital defendant may be represented at a critical stage of the prosecution against him by an attorney who also represents, at that same hearing, two other defendants who have a conflict of interest with him.

4. Whether the Eleventh Circuit has established an unconstitutionally low minimum standard for adjudging the performance of counsel in a capital case.

5. Whether an appellate court may infer jury findings required in a capital death penalty case by Enmund v. Florida, 458 U.S. 782 (1982) that a defendant killed, attempted to kill or intended to kill where such findings had not been made by the jury.

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RECORD CITATION

Citations to the six volume paginated record on appeal will be referred to as "RA Vol. ___, p. ___." All exhibits which were filed with the District Court will be referred to by particular exhibit number or letter and applicable pages. Respondent's Exhibit 1 consists of six volumes and includes the transcripts from petitioner's guilt-innocence trial and second sentencing trial.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

SON H. FLEMING,

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RALPH KEMP, Warden,
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UNITED STATES SUPREME COURT
CASE NO. _____

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Habeas Corpus Death
Penalty Proceeding

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, Son H. Fleming, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 748 F.2d 1435 (11th Cir. 1984) and is contained in the Appendix at pages A-1 through A-28.[1/] The prior decision

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1/ References to the opinions below are designated by "A", followed by the appropriate Appendix page number.

of the United States District Court for the Middle District of Georgia is reported at 560 F. Supp. 525 (M.D. Ga. 1983). The District Court's decision is contained in the Appendix at pages A-29 through A-46.

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was entered on November 29, 1984. The petitioner's petition for rehearing and suggestion for rehearing en banc was denied on June 13, 1985. This Petition for Writ of Certiorari is being filed within ninety (90) days of that date, in accordance with 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

As provided by Supreme Court Rule 21.1(f), the citations and verbatim quotations of the constitutional and statutory provisions applicable to this case are contained in the Appendix at pages A-47 through A-55.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

Petitioner, Son H. Fleming, was convicted on January 26, 1977 and sentenced to death for the murder of Edward Giddens, the police chief of Ray City, Georgia. On appeal, the Georgia Supreme Court affirmed the conviction but reversed the death sentence. Fleming v. Georgia, 240 Ga. 142, 240 S.E.2d 828 (1977).

On remand, Mr. Fleming was again sentenced to death by a new jury, and the Georgia Supreme Court affirmed. Fleming v. Georgia, 243 Ga. 120, 252 S.E.2d 609, cert. denied, 444 U.S. 885 (1979). Mr. Fleming then sought a writ of habeas corpus from the Superior Court of Tattnall County, Georgia. That petition was denied on July 1, 1980. [Resp. Exh. 6]. A certificate of probable cause to appeal was denied by the Supreme Court of Georgia on October 21, 1980. [Resp. Exh. 7]. Certiorari was thereafter denied by this Court. Fleming v. Austin, 452 U.S. 910 (1981).

On October 5, 1981, Mr. Fleming, pursuant to 28 U.S.C. § 2254, filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, Valdosta Division. [RA Vol. 1, pp. 5, 117, 120]. The case was referred to a United States Magistrate who held a hearing on December 6, 1982. [RA Vol. 4].

On December 29, 1982, the Magistrate entered his proposed findings of fact and conclusions of law. [RA Vol. 3, pp. 443-449]. The Magistrate held that petitioner was denied the assistance of counsel at his committal hearing, a critical stage in the prosecution, and recommended that the habeas corpus petition be granted. [Id. at 448-449].

The Honorable Wilbur D. Owens, Jr., United States District Court Judge, held evidentiary hearings on February 11, 1983 and March 4, 1983, [RA Vols. 5 and 6], and on March 25, 1983 entered an order rejecting the Magistrate's recommendation and denying petitioner's application for a writ of habeas corpus. Fleming v. Zant, 560 F. Supp. 525 (M.D. Ga. 1983).

On April 25, 1983, petitioner filed an application for certificate of probable cause to authorize appeal, [RA Vol. 3, p. 569], and a notice of appeal [Id. at 571]. On April 27, 1983, the certificate of probable cause was granted by the District Court. [Id. at 573]. Petitioner then filed his appeal to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed the District Court on November 29, 1984. Fleming v. Kemp, 748 F.2d 1435 (11th Cir. 1984). The Honorable Elbert Tuttle, Senior Circuit Judge, strongly dissented from the affirmance and stated that he would "reverse the judgment of the district court and direct the issuance of a writ of habeas corpus." 748 F.2d at 1462 (Tuttle, J., dissenting).

On December 19, 1985, petitioner filed a Suggestion for Rehearing En Banc/Petition for Rehearing which was denied on June 13, 1985, after a poll of the Eleventh Circuit Judges. This Petition for Writ of Certiorari is filed within ninety (90) days of said denial.

B. Statement Of Facts

The pertinent facts in this case, as they relate to each legal issue, are set forth in detail throughout this petition. The following, however, provides a brief overview and background of the case.

Petitioner, a middle aged black man, was convicted in January, 1977 in the Superior Court of Lanier County, Georgia of the murder of Edward Giddens, the white police chief of Ray City, a tiny town in South Georgia.

On the evening of February 11, 1976, petitioner, his nephew Larry Donnell Fleming, and Henry Willis, III allegedly robbed a grocery store in Adel, Cook County, Georgia.[2/] While driving through neighboring Berrien County, Georgia shortly after the robbery, the men were stopped by Edward Giddens, the police chief of Ray City, who was alone in his car. The men

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2/ The extent of each defendant's involvement in the crimes is not clear. The only witnesses were the defendants themselves. The testimony at their three different trials is inconsistent.

apparently overpowered Chief Giddens, took his .357 Magnum, ordered him into tneir car, and drove several miles, crossing into Lanier County. They stopped at a lake and ordered Chief Giddens out of the car. When Giddens ran, he was shot with his .357 Magnum. Larry Fleming and Henry Willis followed Giddens into the water and fired several shots of .22 caliber ratshot at him. Petitioner has consistently maintained that he had no involvement with the murder. See discussion at section V.G.1 infra.

Mr. Fleming and his co-accuseds were arrested several hours after the shooting in the early morning of February 12, 1976. Each accused was charged with murder, kidnapping and armed robbery. At an appearance before a justice of the peace later that morning, petitioner, an indigent, expressed his desire for counsel. Attorney Edward Parrish, wno had been practicing in Adel for forty years, was appointed thereafter by Judge H. W. Lott to represent petitioner on the kidnapping charge, the only charge for which an indictment had been returned. Judge Lott did not, however, appoint anyone at that time as counsel for petitioner on the murder charge.

On May 14, 1976, a lengthy committal hearing was held for petitioner and his co-accuseds on the murder, kidnapping and armed robbery charges. Petitioner was not represented by counsel at this hearing.

Petitioner was subsequently convicted and sentenced to death.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION THAT THE ISSUE OF WHETHER OR NOT A CAPITAL DEFENDANT WAS REPRESENTED BY COUNSEL AT A CRITICAL STAGE OF THE PROSECUTION AGAINST HIM IS STRICTLY A FACT QUESTION GOVERNED BY THE CLEARLY ERRONEOUS STANDARD OF REVIEW AS OPPOSED TO A MIXED QUESTION OF LAW AND FACT FREELY REVIEWABLE BY AN APPELLATE COURT FAILS TO FOLLOW CONTROLLING PRECEDENT AND RAISES A SIGNIFICANT ISSUE CONCERNING THE RIGHT OF A CAPITAL DEFENDANT SENTENCED TO DEATH TO OBTAIN FAIR AND IMPARTIAL APPELLATE REVIEW.

A. Petitioner Was Not Represented By Counsel At His Committal Hearing, A Critical Stage Of The Prosecution Against Him

Petitioner was arrested on February 12, 1976, and on that same day first expressed his desire for counsel. [Resp. Exh. 1, Vol. VI, p. 326]. On February 24, 1976, twelve days later, Mr. Fleming again asked for counsel. [Resp. Exh. 10, pp. 3-4]. At that time, finding that the defendant was "indigent and without counsel", Judge H. W. Lott appointed Mr. Edward Parrish to represent petitioner on the kidnapping charge, the only charge for which an indictment had been returned. [Resp. Exh. 1, Vol. IV, Record on Appeal, p. 18]. It was not until August 24, 1976, however, more than six months later, that Mr. Parrish was also appointed to represent petitioner on the murder charge.[3/] Mr. Parrish acknowledged that when he was appointed

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3/ In fact, Judge Lott first appointed Mr. Reese Franklin to represent petitioner on the murder charge on August 12,

[Footnote Continued on Next Page]

on the murder charge he had not yet investigated that charge but had confined his investigation to other matters. [RA Vol. 4, pp. 7-8]. Indeed, there would have been no reason for Mr. Parrish to have investigated the murder charge because he had not been appointed on that charge. Mr. Parrish testified in this habeas proceeding that he was certain that prior to August 24, 1976 he had not been appointed and had not represented petitioner on tne murder charge. [Id. pp. 5-8].4/

A committal nearing on the combined charges of murder, kidnapping and armed robbery was held for petitioner and his two co-defendants on May 14, 1976, three months before petitioner obtained any counsel on the murder charge. [Resp. Exh. 3]. Prosecutor Vickers Neugent appeared for the state and

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[Footnote Continued from Previous Page]

1976. [Resp. Exn. 1, Vol. IV, Record on Appeal, p. 14]. Mr. Franklin was disqualified almost immediately, however, because he had a conflict of interest. [Pet. Exh. N, p. 1]. Twelve days later Judge Lott appointed Mr. Parrish to represent petitioner on the murder charge. Thus, the Judge who made these appointments clearly was not under the impression that counsel had previously been appointed to represent petitioner for anything but the kidnapping charge. In addition, Benjamin Zeesman, retained as co-counsel by petitioner's mother, did not become involved in the case until September, 1976, four months after the committal hearing.

4/ Mr. Parrish further testified that prior to August 24, 1976 he had no expectation of being appointed on the murder charge and in fact had congratulated himself for staying out of it. [Id., Vol. 5, p. 54].

Mr. Millard Farmer represented petitioner's co-defendants, but not petitioner. Mr. Parrish, by virtue of his prior appointment on the kidnapping charge, received notice from prosecutor Neugent that a "committal hearing" was taking place, but Mr. Parrish himself admitted at the murder trial to having only been present at a "fractional part of the [committal] hearing" in the capacity of a "spectator", and further stated that he "had nothing to do with that hearing .... "[5/] [Id. at 332-333]. In the District Court below, Mr. Parrish again unequivocally stated that he did not represent petitioner at the May 14, 1976 committal hearing. [RA Vol. 4, p. 8]. Thus, not only had counsel not been appointed on the murder charge prior to the committal hearing, but Mr. Parrish, who had been appointed as counsel on the kidnapping charge, did not represent petitioner at the committal hearing on any of the charges.

The committal hearing was lengthy, involving testimony by eighteen witnesses and the introduction of fifteen exhibits. The exhibits included statements purportedly made by petitioner which, as prosecutor Neugent conceded, contained information which was "both incriminatory and exculpatory." [Resp. Exh. 1,

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5/ At the December 6, 1982 evidentiary hearing, Mr. Farmer recalled that Mr. Parrish was actually asleep during part of his brief attendance at the morning session of the committal hearing. [RA Vol. 4, p. 21].

Vol. VI, p. 313]. The prosecutor acknowledged at trial that, other than at the committal hearing, he made no effort to provide defense counsel with copies of these statements or other exhibits because he assumed that furnishing them into the record at Son Fleming's committal hearing would be sufficient. [Id. at 313-314, 332-333]. In fact, it was not until January, 1977, midway through the guilt-innocence trial, that counsel for petitioner saw these statements for the first time. [Id. at 313-314, 331].

B. The Denial Of Counsel At A Critical Stage Of The Prosecution In A Capital Death Penalty Case Mandates Automatic Reversal

The right to counsel at a "critical stage" of a federal or state criminal proceeding is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Coleman v. Alabama, 399 U.S. 1, 7 (1970); Gideon v. Wainwright, 372 U.S. 335, 345 (1963). This Court has held that a preliminary hearing, primarily because it is the first opportunity for defense counsel to cross examine the prosecution's witnesses, is such a critical stage. Coleman v. Alabama, 399 U.S. at 7-12, 19-20. Similarly, the Georgia Supreme Court has held that Georgia's committal hearing is a critical stage. State v. Hightower, 236 Ga. 58, 222 S.E.2d 333 (1976); State v. Houston, 234 Ga. 721, 218 S.E.2d 13 (1975).

The denial of counsel at a critical stage of a capital prosecution mandates automatic reversal. Irreparable prejudice is presumed to result. In Holloway v. Arkansas, 435 U.S. 475 (1978), this Court thus held:

> [W]hen a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.

Id. at 489 (emphasis added). The record in this proceeding clearly reflects that petitioner, who has been convicted of murder and sentenced to die, was deprived of the presence and assistance of an attorney at his committal hearing, a critical stage in the prosecution, and therefore is entitled to reversal of his conviction.

C. The Eleventh Circuit Court Of Appeals Used An Incorrect Standard Of Review Regarding The Issue Whether Petitioner Was Represented By Counsel At His Committal Hearing

The United States Magistrate, after holding an evidentiary hearing, concluded that petitioner did not have counsel at his committal hearing, a critical stage of the prosecution against him, and recommended reversal. [Id., Vol. 3, p. 444-445]. The United States District Court thereafter considered petitioner's claims de novo and denied relief. The Eleventh Circuit viewed the lower court's decision as alternatively holding either that the May 14, 1976 proceeding was an "agreed-upon discovery

conference", not a committal hearing,[6] or that, if it was a committal hearing, attorney Millard Farmer had represented petitioner. 748 F.2d 1443-44.

The majority, although acknowledging that the issue was, at a minimum, "nettlesome" and "debatable", declined to decide whether the May 14, 1976 proceeding was a committal hearing, [7] since it agreed with the District Court's holding that petitioner was represented by Mr. Farmer at the May 14, 1976 hearing. In making this determination, however, the court incorrectly relied upon the "clearly erroneous" standard of

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6/ Petitioner had already been indicted on the kidnapping charge, but not on the murder and armed robbery charges. Therefore, although the May 14, 1976 hearing, under a strained analysis, arguably may have only been a "discovery conference" with regard to the kidnapping charge, it was clearly a committal hearing with regard to the murder and armed robbery charges. At the start of the May 14, 1976 hearing, Vickers Neugent, the prosecutor, clearly stated, among other things, that the hearing that was about to take place was a "committal hearing" for Son Fleming on the murder charge. [Resp. Exh. 3, pp. 3-4; 748 F.2d at 1456-57 (Tuttle, J., dissenting)]. Furthermore, consistent therewith, the state, having the burden of proving probable cause, called the first twelve witnesses at the hearing. [Resp. Exh. 3].

7/ As Judge Tuttle found, however, "there is no question that [the May 14, 1976 hearing] was a committal hearing as to the petitioner." 748 F.2d at 1456 (Tuttle, J., dissenting). In Judge Tuttle's view, not only was the May 14, 1976 hearing clearly a committal hearing with regard to at least the murder and the armed robbery charges, but it was also precisely the type of hearing which this Court has deemed to be a critical stage of a prosecution. Id. at 1457 (citing Coleman v. Alabama, 399 U.S. 1, 9 (1970).

review set forth in Fed. R. Civ. P. 52(a). The Eleventh Circuit stated that the District Court's holding that Mr. Farmer represented petitioner at the committal hearing "constituted a finding of fact which we must accept unless clearly erroneous." 748 F.2d at 1444 (emphasis added). The Eleventh Circuit's use of the clearly erroneous standard, however, is incorrect and establishes an improper precedent. Furthermore, had the Eleventh Circuit used the proper standard of review it could not have upheld the District Court's determination that Mr. Farmer represented petitioner at the committal hearing.

While it is generally true that findings of fact by a district court should be upheld by an appellate court unless clearly erroneous, the scope of an appellate court's appropriate review of mixed questions of law and fact is much broader. Mixed questions of law and fact involve the application of legal principles to the historical facts of a case. Cuyler v. Sullivan, 446 U.S. 335, 342 (1980). The presumption of correctness applies only to factual findings and does not apply to legal findings or to mixed questions of law and fact. Hance v. Zant, 696 F.2d 940 (11th Cir. 1983). Rather, for mixed quesions of law and fact, an appellate court is empowered to substitute its own judgment for that of the lower court. Baty v. Balkcom, 661 F.2d 391, 395 n.7 (5th Cir. 1981), cert. denied, 456 U.S. 1011 (1982).

This Court has clearly held that questions regarding a defendant's constitutional right to legal representation are mixed questions of law and fact which are freely reviewable. Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052, 2070 (1984) (determination of whether counsel rendered effective assistance is a mixed question of law and fact); Cuyler v. Sullivan, 446 U.S. 335, 342 (1980) (determination of whether counsel undertook multiple representation, the exact issue herein, is not a finding of fact but rather a mixed determination of law and fact). See also Baty v. Balkcom, supra, (determination of whether counsel rendered effective assistance of counsel is a mixed question of law and fact). While primary facts such as what an attorney did or did not do during the course of a proceeding are subject to a clearly erroneous standard of review, an appellate court must apply its own judgment as to whether that conduct constituted a constitutional violation. See Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982).

The above issues regarding legal representation constitute mixed questions of law and fact because they require an ultimate decision as to whether there was a constitutional violation, i.e., was the defendant deprived of his Sixth and Fourteenth Amendment right to counsel. See Neil v. Biggers, 409 U.S. 188, 193-94 (1972) (Court freely reviewed findings

made by both the Sixth Circuit Court of Appeals and the district court below the Sixth Circuit "where the dispute between the parties [was] not so much over the elemental facts as over the constitutional significance to be attached to them."); United States v. Cockrell, 720 F.2d 1423, 1426 (5th Cir. 1984).

In the instant case, the Eleventh Circuit's affirmation that Mr. Farmer represented petitioner at his committal hearing constituted a legal conclusion that there was no constitutional violation of Mr. Fleming's right to counsel. While questions such as "Was Mr. Farmer present at the committal hearing?", "Did he converse with petitioner at that hearing?" or "What were the nature of Mr. Farmer's questions?" are primary or historical facts in the sense of a recital of external events [see Cuyler v. Sullivan, 446 U.S. at 342], the ultimate holding that such conduct rose to a level of "representation" such that petitioner was not denied his fundamental constitutional right to counsel is a legal conclusion that requires the application of legal principles to historical facts. Contrary to the holding of the majority, therefore, the question whether petitioner was represented by counsel at his committal hearing was freely reviewable.[8/]

8/ Judge Tuttle noted in his dissent that the questions relating to petitioner's representation at the committal

[Footnote Continued on Next Page]

D. Had The Eleventh Circuit Majority Freely Reviewed The Issue Whether Petitioner Was Represented By Counsel At His Committal Hearing, It Could Not Have Upheld The District Court's Conclusion That Mr. Farmer Represented Petitioner At That Hearing

It is clear that had the Eleventh Circuit majority not considered itself bound by the clearly erroneous standard of review, and had it in fact freely reviewed the issue whether petitioner was represented by counsel at the May 14, 1976 committal hearing, as under the law it was obligated to do, the majority could not have concluded that Mr. Farmer represented petitioner at this hearing. Rather, it is apparent that only by using the clearly erroneous standard of review could the majority rationalize this strained holding.

As shown below, the probative value of the "documentation" upon which the majority relied in concluding that the District Court's holding was not clearly erroneous is extremely questionable, at best. Moreover, this "documentation" is

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[Footnote Continued from Previous Page]

hearing are "mixed questions of law and fact which are freely reviewable ... [The] conclusions [herein] are more than simply findings of primary or historical fact. They are also conclusions as to the Sixth and Fourteenth Amendment implications of such facts." 748 F.2d at 1456 (Tuttle, J., dissenting; citations omitted). Judge Tuttle further stated, however, that "even if this were an appropriate case for deferential review, in my view the record amply demonstrates that these conclusions by the district court were clearly erroneous." Id.

contrary to the overwnelming weight of the evidence (ignored by the majority, apparently because it felt bound to the clearly erroneous standard), which plainly illustrates that Mr. Farmer did not represent petitioner.

The majority's result-oriented analysis accorded primary importance to the cover page of the transcript from the committal hearing which referred to Mr. Farmer as "counsel for the defendants." Mr. Farmer did represent "defendants" at the committal nearing -- Larry Donnell Fleming and Henry Willis, III, petitioner's co-defendants. For the majority to have relied upon the court reporter's ambiguous designation to determine that all three defendants were represented is unsupportable, and, in this capital case, alarming. The majority also relied upon the fact that Mr. Farmer responded to the prosecutor's opening remarks, which referred to Mr. Farmer as counsel for the "defendants", by stating, "I think tnat is correctly stated." Again, Mr. Farmer represented more than one defendant at this hearing, albeit not petitioner. Moreover, the majority's analysis of Mr. Farmer's remark is misleading. Mr. Farmer's statement that the prosecutor's remarks were "correctly stated" was in response to a long and rambling soliloquy in which the prosecutor went into great detail about the purpose and scope of the hearing. [Resp. Exh. 3, pp. 3-4]. The majority's reliance on this fragment in the record, taken

out of its natural context, is unjustifiable. Next, the majority, without explanation or elaboration, stated that "Farmer conducted all the defense questioning, as if he represented all three defendants." 748 F.2d at 1444. The record simply does not bear this out. Although some of Mr. Farmer's examination may have indirectly related to petitioner, this would not be surprising since the involvement of all three defendants was allegedly closely related. Finally, the majority found "it important to note that Farmer never suggested to the court or the prosecutor that he was not representing all three defendants at the hearing." Id.[9/] Yet, directly to the contrary, Mr. Farmer testified that just prior to the committal hearing he informed the court that he only represented Henry Willis and Larry Donnell Fleming. [Id., Vol. 4, pp. 33-34]. Furthermore, the majority ignored the fact, as demonstrated below, that no one assumed, and there was no reason to assume, that Mr. Farmer represented petitioner. Finally, and most importantly, in any event the majority's strained reasoning cannot alter the pivotal fact that

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9/ The majority did not believe that Mr. Farmer, an attorney with "vast experience and expertise in criminal law" would have mislead the court or the prosecution as to who he represented at the committal hearing. 748 F.2d at 1444-45. Yet, the majority, by implication, suggests that Mr. Farmer perjured himself by unequivocally testifying under oath that he did not represent petitioner.

Mr. Farmer did not represent petitioner at the committal hearing. Petitioner's right to counsel cannot be annulled by the failure of the court and its officers to ascertain clearly whether he was aware of that right or affirmatively waived it, and whether counsel was present on his behalf.

Against these unsupportable and conclusory findings, there is a mountain of uncontradicted, unequivocal evidence that Mr. Farmer did not represent petitioner. Had the Eleventh Circuit majority freely reviewed this evidence, as under the law it was required to do, it could not have found that Mr. Farmer represented petitioner. No one -- not petitioner, not Mr. Farmer, not Mr. Parrish, not the prosecutor, not even the judicial officer who presided over the committal hearing -- believed for one moment tnat Mr. Farmer represented petitioner at this hearing.

Mr. Farmer expressly and unequivocally stated under oath that although he represented Henry Willis and Larry Fleming at the committal hearing, he did not represent and had no intention of representing petitioner. In fact, Mr. Farmer recognized that Son Fleming's interests were clearly inconsistent with those of his clients. [Id., Vol. 4, pp. 17-19]. Mr. Farmer stated that he has never represented Son Fleming and that prior to the committal hearing he had never even spoken with or seen Mr. Fleming. [Id. at 19].

Petitioner's co-accuseds sat with Mr. Farmer at the committal hearing and conversed with him about the case. Petitioner, on the other hand, sat apart from Mr. Farmer and did not have any conversations with him at any time during the committal hearing. [Id. at 20]. Mr. Parrish, who was present at a portion of the committal hearing as a "spectator", testified that he was not under the impression that Mr. Farmer was representing petitioner and, in fact, was "sure" that Son Fleming was not represented at the committal hearing by anyone. [Id. at 13]. Prosecutor Neugent also did not believe that Mr. Farmer represented petitioner [Id., Vol. 4, pp. 40-43, 52-55; 748 F.2d at 1459-60 (Tuttle, J., dissenting)]. Finally, as evidenced throughout the record in this case, but as expressly stated in the Affidavit of Mr. Dan Cowart,[10/] the judicial officer who conducted the committal hearing, even the

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10/ A copy of the Affidavit is contained in the Appendix at A-56 and A-57. Although the record in this case clearly and amply evidences that no one, including the judicial officer who presided over the committal hearing, believed for one moment that Mr. Farmer represented petitioner, and, in fact, as noted herein, the respondent did not even make this argument in his Eleventh Circuit brief, petitioner submited the original of the attached Affidavit with his Suggestion for Rehearing En Banc/Petition for Rehearing in an effort to directly address the Eleventh Circuit majority's apparent concern that despite the clarity of the record on this issue the judicial officer who presided over the committal hearing may have somehow been under the impression that Mr. Farmer represented petitioner at that hearing.

court did not believe Mr. Farmer represented petitioner, but rather, was clearly aware that Mr. Farmer represented only Henry Willis and Larry Donnell Fleming. Thus, no one present at the hearing believed that Mr. Farmer represented petitioner. In fact, apparently recognizing that the evidence that Mr. Farmer was not representing petitioner was so overwhelming, the appellee-respondent did not even make this contention in his Eleventh Circuit brief and actually acknowledged that Mr. Farmer represented only Henry Willis and Larry Fleming. [Appellee's Eleventh Circuit Brief, p. 26].

In spite of the uncontradicted evidence, the majority, by applying the clearly erroneous standard of review, affirmed the District Court's holding that petitioner was represented at the committal hearing by Mr. Farmer. This holding is improper, based upon an incorrect standard of review, and in conflict with the mandate of this Court. Petitioner therefore respectfully requests that this Court grant his Petition for Writ of Certiorari, hold that the issue whether a capital defendant was represented by counsel at a critical stage of the prosecution (and therefore whether he was afforded his constitutional right to the assistance of counsel) is a mixed question of law and fact, and set aside the Eleventh Circuit's majority opinion.

II. THE ELEVENTH CIRCUIT'S DECISION THAT THE DISTRICT COURT'S HOLDING THAT MILLARD FARMER REPRESENTED PETITIONER AT THE COMMITTAL HEARING WAS NOT CLEARLY ERRONEOUS RAISES A SIGNIFICANT ISSUE CONCERNING A DEFENDANT'S RIGHT TO THE ASSISTANCE OF COUNSEL.

As set forth in section I.D. of this Petition for Writ of Certiorari, Millard Farmer did not represent petitioner at the committal hearing. As noted, not one person related to the events in question believed that Mr. Farmer represented petitioner at this hearing. On the contrary, as set forth in the record and herein, neither Mr. Parrish, nor the prosecutor, nor the judicial officer who presided over the hearing were under the impression that Mr. Farmer represented petitioner. Furthermore, Mr. Farmer unequivocally testified under oath that he has never represented petitioner at any proceeding.

The Magistrate, after conducting an extensive evidentiary hearing, concluded that petitioner was denied the assistance of counsel at his committal hearing and recommended that the habeas corpus petition be granted. Judge Tuttle, in his dissent, also stated he would direct the issuance of a writ of habeas corpus. Although Judge Tuttle believes, as does petitioner, that the majority's use of the clearly erroneous standard of review was incorrect [see discussion at section I supra], Judge Tuttle noted: "[i]n any event, even if this were an appropriate case for deferential review, in my view the record amply demonstrates that these conclusions by the

district court [that petitioner was represented by Millard Farmer at the committal hearing] were clearly erroneous." 746 F.2d at 1456 (Tuttle, J., dissenting).

Petitioner submits that the majority's decision on the important constitutional issue of whether Mr. Fleming was represented by counsel at his committal hearing, a critical stage of the prosecution, is not correct. Contrary to the Eleventh Circuit's conclusion, the District Court's holding that Mr. Farmer represented petitioner at his committal hearing is clearly erroneous. Mr. Fleming was denied his constitutional right to the assistance of counsel and therefore requests that this Court grant certiorari to correct this injustice.

III. THE ELEVENTH CIRCUIT'S DECISION THAT A DEFENDANT COULD BE REPRESENTED AT A CRITICAL STAGE OF THE PROSECUTION AGAINST HIM BY AN ATTORNEY WHO ALSO REPRESENTED, AT THAT SAME HEARING, TWO OTHER DEFENDANTS WHO HAVE A CONFLICT OF INTEREST WITH HIM FAILS TO FOLLOW CONTROLLING PRECEDENT AND RAISES A SIGNIFICANT ISSUE CONCERNING A CAPITAL DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The lower court's holding that Mr. Farmer represented petitioner at his committal hearing actually created an additional constitutional violation of Mr. Fleming's right to the effective assistance of counsel. Even if Mr. Farmer purported to represent petitioner at the committal hearing, which he did not, "he could not have properly represented both the petitioner and his co-defendants because of an actual and

substantial conflict of interest which had already been manifested in their respective statements to the police." 748 F.2d at 1459 (Tuttle, J., dissenting). Petitioner accused his co-defendants of shooting Officer Giddens. Both co-defendants accused petitioner of the shooting. The only witnesses to the murder were the defendants themselves. In addition, co-defendant Larry Fleming and petitioner were each seeking to incriminate the other in order to exculpate himself. 748 F.2d at 1459-60 (Tuttle, J., dissenting). Under these circumstances, an actual and substantial conflict of interest existed so that petitioner was denied legal representation, in any event, requiring reversal without inquiry into prejudice. See 748 F.2d 1459-60 (Tuttle, J., dissenting); Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980); Glasser v. United States, 315 U.S. 60, 76 (1942); Johnson v. Hopper, 639 F.2d 236, 237 (5th Cir.), cert. denied, 454 U.S. 1010 (1981); Foxworth v. Wainwright, 516 F.2d 1072, 1076-77 (5th Cir. 1976).[11/]

11/ In any event, petitioner would clearly have been prejudiced because Mr. Farmer did not provide Mr. Parrish, petitioner's ultimate counsel on the murder charge, with any of the exhibits introduced against petitioner at the committal hearing, including purported statements made by petitioner. In fact, Mr. Parrish never received a copy of the transcript from the commital hearing or any of the exhibits introduced at that hearing. Of course, since Mr. Farmer did not represent petitioner at the committal hearing, or at any other time, there would have been no reason for him to provide Mr. Parrish with any information concerning petitioner's case.

The majority ignored the conflict of interest in violation of the mandate of this Court. As a result, the Eleventh Circuit has established a dangerous precedent which has the effect of eroding a capital defendant's constitutional right to the assistance of counsel. Is the Eleventh Circuit suggesting that it is now permissible for counsel to represent two capital defendants with wholly different interests? Is it suggesting that conflicts of interest are permissible during pre-trial proceedings? Is it suggesting that the instant facts do not constitute a conflict? Any one of these conclusions results in a significant departure from established precedent. Therefore, petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari.

IV. THE ELEVENTH CIRCUIT'S DECISION THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS GUILT-INNOCENCE TRIAL AND HIS SENTENCING TRIAL FAILS TO FOLLOW CONTROLLING PRECEDENT AND RAISES A SIGNIFICANT ISSUE CONCERNING A CAPITAL DEFENDANT'S CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL.

A. Introduction

This Court set forth the standards for evaluating ineffective assistance of counsel claims in Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In Washington, this Court held that in order to prevail on an ineffective assistance of counsel claim, petitioner must not only prove that counsel's performance was

deficient but that the deficient performance prejudiced the defense. Based upon the facts of this case, petitioner has clearly met his burden. In fact, petitioner submits that the Eleventh Circuit has established an unconstitutionally low minimum standard for adjudging the performance of counsel in a capital case.

Petitioner devoted thirty-three pages of his eighty-five page Eleventh Circuit brief to his allegations of ineffective assistance of counsel. In this petition, however, page and other limitations require petitioner to limit his discussion to only the most egregious examples, in chronological order, of ineffectiveness. It should be recognized, though, that the record discloses countless examples, other than those referenced herein, of counsel's failure to take actions which were plainly needed to properly investigate petitioner's case and in order to marshal and present a thorough and informed defense. Cumulatively, the record reflects a haphazard and dangerously indifferent attitude on the part of petitioner's counsel, and particularly Mr. Parrish, who admitted that he had hoped not to be appointed on the capital felony and had, in fact, avoided any involvement in the murder charge before his appointment in August, 1976. [RA Vol. 5, p. 54]. Counsel's reluctant and incomplete efforts on petitioner's behalf denied him the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

B. Ineffective Assistance Of Counsel At The Guilt-Innocence Trial

1. Failure To Request A Change Of Venue.

Petitioner, who is black, was charged with the murder of the white police chief of Ray City, Georgia. The case presented an emotion-packed trial in a small South Georgia community. The publicity was widespread and relentless. [See, e.g., Pet. Exhs. O and W]. The extensiveness of the publicity is apparent from the order granting a change of venue to Henry Willis, petitioner's co-accused. The court there stated:

> This case has received extensive local newspaper coverage .... During the pendency of this case, approximately half of the issues of the weekly newspaper in Lanier County have carried stories concerning this case on the front page. The Valdosta Daily Times, a daily newspaper published in a larger city some twenty miles away, has given extensive coverage to this case, with numerous front page stories, and continuing print coverage including the refreshing of earlier information each time there have been new developments in the case or the proceedings .... The case and the proceedings have also received extensive coverage from the Florida Times-Union, a large daily newspaper published in Jacksonville, Florida and having extensive circulation in the South Georgia area. Both the Lanier County News and the Valdosta Daily Times have devoted editorial comments to this case, in addition to regular news stories and photographs.
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> In addition to the print media, this case has received considerable television coverage via station WCTV, Channel 6, which covers a substantial market area in south Georgia .... Each of the news media witnesses testified that no other court case

> has received as large an amount of news coverage as this case has within the same period of time, so far as is within their knowledge.

State of Georgia v. Henry Willis III, No. 77-181, Superior Court of Lanier County. [Pet. Exh. W, pp. 4-5 (emphasis in original)].12/

Based upon the foregoing, the court in the Henry Willis case concluded that "there is a reasonable liklihood [sic] that the facts and factors recited [in the court's order] will prevent a fair trial by an impartial jury in the county where the crime is alleged to have been committed", and, accordingly, granted the motion for a change of venue. [Id. at 11].13/

Predictably, the jury selection and voir dire at the trial in Lanier County evidenced extensive knowledge on the part of the jurors of the crime and the victim. [Resp. Exh. 1, Vol. IV, First Trial Tr., pp. 4-47; Vol. V, pp. 48-149]. Of the

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12/ In addition to the extensive local newspaper coverage and considerable television coverage, publicity was generated by the district attorney himself "by his comments and conduct, including the burning of a law book on the lawn of the Lanier County Court House in the presence of news media representatives and photographers." [Pet. Exh. W, p. 4].

13/ Both of Mr. Fleming's co-accuseds were granted a change of venue. [Resp. Exh. 1, Vol. IV, Record on Appeal, p. 1; Pet. Exh. W] Larry Fleming's trial took place in Thomas County. Henry Willis' trial took place in Bleckley County. Larry Fleming, although convicted of murder, received a life sentence.

twenty-four veniremen who were asked whether they had heard of the case, twenty-two stated they had. [See Pet. Exh. M]. Of the forty-five who were asked whether they knew the victim, twelve said they did. [Id.]. The prosecutor himself, recognizing the high profile of the case, asked prospective jurors whether they could ignore what they had heard and read. [See, e.g., Resp. Exh. 1, Vol. IV, First Trial Tr., pp. 12, 43; Vol. V, pp. 53-54, 95].14/

Under the circumstances of this case, there does not appear to be any justification for failing to move for a change of venue. The publicity and public sentiment was so overwhelming that it would have been impossible for any of the three defendants to obtain a fair trial in this area. Yet, the Eleventh Circuit concluded that "petitioner's attorneys exercised reasonable professional judgement in deciding not to pursue a change of venue." 748 F.2d at 1435.

As a result of trial counsel's failure to move for a change of venue, petitioner was convicted by a jury that acted under the influence of passion, prejudice and other arbitrary factors in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Petitioner's

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14/ In closing argument, the prosecutor effectively and repeatedly referred to the local nature of the crime. [See, e.g., Resp. Exh. 1, Vol. III, Arguments of Counsel, pp. 15-16, 23-24]

conviction must therefore be reversed. Murphy v. Florida, 421 U.S. 794 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 281 U.S. 532 (1962); Sheppard v. Maxwell, 384 U.S. 333 (1966); United States v. Williams, 523 F.2d 1203 (5th Cir. 1975).

2. Failure To Attend The Committal Hearing.

Trial counsel for petitioner failed to participate in the lengthy committal hearing held with respect to the murder, kidnapping and armed robbery charges. [See discussion at section I supra]. Although Mr. Parrish had not been appointed prior to the May 14, 1976 hearing to represent petitioner on the murder or armed robbery charges, Mr. Parrish had been appointed to represent petitioner on the kidnapping charge. As discussed in section I herein, despite his prior appointment on the kidnapping charge, Mr. Parrish, by his own admission, was present at only a "fraction" of this hearing in the capacity of a "spectator". Incredibly, the Eleventh Circuit appears to justify such non-feasance because Mr. Parrish "felt that it was in petitioner's best interest not to stay." 748 F.2d at 1447. Petitioner, however, submits that Mr. Parrish's failure to attend the committal hearing was a complete breach of his obligation to his client. No conveivable rationale can justify such apathy, disinterest, and careless disregard of a crucial opportunity not only to discover information about the state's

case, but also information potentially beneficial to the defense, especially in a capital case. See Coleman v. Alabama, 399 U.S. 1, 9-10 (1970). The significance of the committal hearing cannot be overstated. Trial counsel thereafter failed, even knowing that the hearing had taken place, to attempt to review the transcript of the hearing or to obtain the exhibits. [Resp. Exh. 1, Vol. VI, pp. 313-314, 331-334].

3. Failure To Object To Belated Witness List.

Petitioner's trial counsel failed to object or even to request a continuance of the trial in order to interview witnesses when the state did not produce a list of witnesses at or before the arraignment, as required by O.C.G.A. § 17-7-110 (Ga. Code Ann. § 27-1403). Pursuant to section 17-7-110, "no witness shall be permitted to testify for the state whose name does not appear on the list of witnesses as furnished to the defendant [prior to the arraignment]."

The September, 1976 indictment accusing the petitioner of murder lists only four prosecution witnesses, [Resp. Exh. 1, Vol. IV, Record on Appeal, p. 9], notwithstanding the fact that as early as February 27, 1976 the prosecutor had knowledge of at least thirty potential witnesses. [Pet. Exh, N].

At the arraignment held on December 13, 1976, the state committed to provide a full witness list within ten days. [Resp. Exh. 1, Vol III, Tr. of Arraignment, p. 6]. However, a

first amended list, adding ten names, was not filed by the state until January 10, 1977. [Id., Vol. IV, Record on Appeal, p. 25]. A second amended list, containing forty-three names, was not filed until January 18, 1977, just six days in advance of trial. [Id. at 28]. Yet another list, adding four names, was filed on January 19, 1977. [Id. at 29]. The state could not in good faith have contended that it was not aware of the majority, if not all, of the witnesses as of December 13, 1976, the date of the arraignment. Despite these facts, petitioner's counsel did not object under section 17-7-110, or even request a continuance to interview the witnesses.

The prejudice resulting to petitioner's defense from counsel's failure to object or request a continuance is exemplified by examining the testimony of Ira Bass, a key prosecution witness. As discussed in greater detail at section V.G.1 infra, the only evidence offered at either trial by the prosecution that Mr. Fleming had any intent to kill came from Ira Bass, a convicted child molester, who was being held in the Cook County jail at the same time as petitioner. According to Mr. Bass' testimony, Mr. Fleming admitted to him that he shot Chief Giddens. [Id., Vol. II, pp. 284-285]. However, Mr. Fleming consistently denied that he shot or attempted to shoot Chief Giddens, [see, e.g., id., pp. 253, 262; Vol. VI, pp. 348, 432, 436, 448, 451, 495], and in fact denied ever

speaking with Mr. Bass. [Id., Vol. VI, p. 495; Vol. II, First Trial Tr., p. 337].

Notwithstanding the fact that the prosecutor was aware at least as early as February 27, 1976 that Ira Bass had given a statement to Georgia Bureau of Investigation Special Agent H. E. Greeson, [Pet. Exh. N], Ira Bass was not identified until the prosecutor filed a second amended witness list on January 18, 1977, just six days before trial.

Petitioner's trial counsel never interviewed Ira Bass. [RA Vol. 5, p. 40]. Although Mr. Parrish testified that he previously knew the "nature" of Ira Bass' testimony, [id.], it is clear that he did not learn the substance of the testimony until during the first trial. Counsel did not object, however, to the state's last minute designation of Ira Bass as a witness despite a clear statutory basis for doing so. Incredibly, the Eleventh Circuit held that petitioner was not prejudiced by counsel's failure to object. 748 F.2d at 1447.

C. Ineffective Assistance Of Counsel At The Sentencing Trial

1. Introduction

The sentencing trial in a capital case may be the most critical stage of a case in which the death penalty is sought. The importance of a defendant's receiving effective assistance of counsel in preparing for and presenting this phase of the

case cannot be overstated. See Gardner v. Florida, 430 U.S. 349, 358 (1977). In light of trial counsel's conduct at petitioner's second sentencing trial, it was inevitable that the jury would impose a death sentence. The record in this case reflects that trial counsel did almost nothing to prepare for the sentencing trial. Their failure to review applicable law and their continuing haphazard and indifferent approach to the defense combined to allow the commission of numerous constitutional errors.

2. Failure To Obtain A Meaningful Change Of Venue For The Sentencing Trial.

After petitioner's initial conviction and sentence, the Supreme Court of Georgia reversed the sentence and remanded for a new sentencing trial. Prior to this trial, defense counsel filed a motion for a change of venue asserting that a fair trial could not be obtained in Lanier County, Georgia and pointing out the fact that petitioner's co-accuseds had been granted a change of venue based upon the tremendous and overwhelming pretrial publicity in South Georgia. [See Pet. Exh. W; Resp. Exh. 1, Vol. IV, Record on Appeal, p. 1]. Rather than change the venue to a relatively distant county, the trial judge, with the express approval of defense counsel, [RA Vol. 5, p. 65], changed the venue to Cook County, Georgia, the county where the armed robbery which preceded the murder took

place. Cook County is approximately 10 miles from Lanier County, the scene of the murder. [Id. at 30].

Trial counsel was obviously aware of the extensive publicity surrounding the case and the local public sentiment against his client. [Id. at 27-28]. Nevertheless, Mr. Parrish agreed to holding the sentencing trial in Cook County, Georgia, the location of his practice. [Id. at 65]. The Eleventh Circuit merely stated that such action is presumed to be "sound trial strategy." 748 F.2d at 1451.

3. Failure To Investigate And Prepare For Sentencing Phase Of Trial/Failure To Present Mitigation Evidence

In Woodson v. North Carolina, 428 U.S. 280 (1976), this Court held that "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. at 304. To avoid the arbitrary and capricious imposition of the death penalty condemned in Furman v. Georgia, 408 U.S. 238 (1972), the jury should have "as much information before it as possible when it makes the sentencing decision." Gregg v. Georgia, 428 U.S. 153, 204 (1976). The sentencer should "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any

of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis added). Accord, Eddings v. Oklahoma, 455 U.S. 104 (1982); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

This Court has therefore made it abundantly clear that the death penalty is qualitatively distinct, and that if such a harsh and final punishment is to exist, it may only be proper under a system which affords a very high degree of reliability and permits the sentencing jury to hear a broad range of mitigating circumstances and factors individual to the defendant.[15/] Tne bifurcated procedure mandated in death penalty trials is designed to guarantee the reliability required by Lockett and other Supreme Court decisions. As a result of trial counsel's ineffectiveness, however, petitioner was denied his fundamental constitutional right to present

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15/ Petitioner's counsel evidenced a notable lack of familiarity with this Court's recent and important capital punishment decisions. Mr. Parrish testified that in his view "criminal law is really simpler than civil law ... and the murder laws haven't been changed a great deal since I started practicing over fifty years ago." [RA Vol. 4, p. 42]. Mr. Zeesman testified that he did not recall whether he had read Gregg v. Georgia, supra, or other relevant Supreme Court decisions. [RA Vol. 6, pp. 26-27]. This was the first capital murder case that Mr. Zeesman had tried under the post Furman v. Georgia, supra, capital sentencing scheme. [Id. at 26]. It is clear that Mr. Zeesman did not understand the significance or role of the sentencing trial.

mitigating information and was denied the individualized determination which this Court has held to be so critical to the constitutionality of the death penalty.

First, trial counsel made an incomplete and inadequate investigation of defendant's character and background. At the February 11, 1983 evidentiary hearing held before the District Court, Edward Parrish testified that it was the sole responsibility of Benjamin Zeesman, co-counsel for petitioner, to investigate petitioner's character. [RA Vol 5, pp. 46, 74]. Mr. Zeesman, however, stated that his search for character witnesses was merely a "sideline." [Id., Vol. 6, p. 4]. It is apparent from the record that petitioner's counsel made virtually no effort to gather or to present evidence of petitioner's character or of any other mitigating factors, despite the fact that such evidence was readily available.

The most egregious illustration of the inadequacy of Mr. Zeesman's investigation is the fact that, incredibly, he did not discuss mitigation evidence or potential character witnesses with the petitioner himself. [Id. at 5]. As noted previously by the Eleventh Circuit, one of the "cornerstones of effective assistance of counsel" is a "meaningful discussion with one's client." Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). Obviously, petitioner himself is the best source of character information and potential witnesses.

Mr. Zeesman testified that he spoke to Son Fleming's mother and some of his brothers and sisters. [RA Vol. 6, pp. 5, 16-17]. He did not recall, however, the extent or nature of the conversations, or even which members of the family he spoke with. [Id. at 23, 24 and 28]. Mr. Zeesman "believe[d]", but was not sure, that he spoke to the family members "about Son and the case." [Id. at 28]. Petitioner's mother is deceased and could not testify as to the nature and extent of her conversations with Mr. Zeesman. Florence Hall, Son Fleming's sister, stated under oath that she was introduced to Mr. Zeesman but that "the only thing [she] ever heard Mr. Zeesman ask about Son's case was whether he was going to be paid the rest of his fee. He never explained anything ... about Son's case or asked any other questions about Son." [Id., Vol. 5, p. 489]. Handy Fleming, Jr., Son Fleming's brother, stated under oath that he was "never contacted by [his] brother's lawyers." [Id. at 491]. Mary Dickson, another one of petitioner's sisters, also stated that although she was introduced to Mr. Zeesman, he never explained the nature of the penalty phase of a capital trial or explained the meaning of mitigating circumstances. [Id. at 496]. All three of these people swore that they would have testified to their brother's good character had they been requested to do so and could have directed Mr. Zeesman to numerous other witnesses who could have

testified favorably at the sentencing trial on petitioner's behalf. [Id. at 489, 491, 496]. Instead, not one character witness testified on petitioner's behalf. No mitigating evidence was introduced. It is difficult to comprehend how the Eleventh Circuit could find that counsel's performance under these circumstances constituted a "vigorous and thorough defense." 748 F.2d at 1435.

Petitioner's habeas counsel were able with minimal effort to obtain seven affidavits from persons who stated that they were never contacted by petitioner's trial counsel, but had they been, they would have testified favorably on petitioner's behalf.[16/] [Id. at 484-499]. These affidavits reflect the fact that with reasonable diligence -- and without having to turn every stone -- petitioner's counsel could have discovered several witnesses who would have been willing to testify as to a substantial amount of mitigating evidence which could have been presented at the sentencing phase of the trial.[17/] These mitigating circumstances include, but are not limited to, the fact that the petitioner was a non-violent person, petitioner

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16/ The seven affiants were located in less than one day by talking with petitioner and family members.

17/ The affiants include a deputy sheriff and a fire chief, both notable figures in the community, whose testimony would no doubt have carried substantial weight with the jury.

left school at a very early age to support his mother, brothers and sisters, and petitioner was a hard worker and an honest employee. [Id.].[18/] In fact, Mr. Parrish testified that he believed and was aware that Mr. Fleming was basically a non-violent person, that Mr. Fleming had no leadership capability, that he was not a complainer, that he was always cooperative with law enforcement officials, and that he dropped out of school in the fifth grade to support his family. [Id., Vol. 5, pp. 71-72, 74].

Trial counsel not only failed to investigate and prepare mitigation evidence and to call witnesses on petitioner's behalf, but also, incredibly, attempted to elicit mitigation testimony from the state's witnesses, obviously without first ascertaining what the testimony would be. A prime example is Terry Coney, the person who loaned his car to petitioner on the night of the murder. On recross-examination by petitioner's trial counsel, the following took place:

> Q: And these things that you heard of Son doing, they were nothing but when he would get drunk and get into a brawl and have a fistfight. There was nothing like this kind of a crime was it? No robbery was there?

16/ In addition, Son Fleming could not read or write. [Resp. Exh. 1, Vol. II, p. 333].

A. Well, y'all probably already know it anyway. He shot his brother-in-law.

Q. Were you there?

A. I wasn't there, but I wasn't too far off. My brother and them and everybody around there knows this. He was there.

[Id., Vol I, Second Penalty Trial Tr., pp. 83-84]. Terry Coney was one of eighteen witnesses who testified at the May 14, 1976 committal hearing, in which Mr. Parrish did not participate.

One of the most prejudicial omissions made by petitioner's counsel in preparing for and presenting petitioner's defense at the second sentencing trial was their complete failure to gather and introduce evidence from which the jury could reasonably have concluded that Son Fleming did not kill, attempt to kill, or intend to kill Chief Giddens and therefore did not have the culpability necessary under Enmund to be subject to the death penalty. For example, Mr. Parrish and Mr. Zeesman never obtained GBI Agent Harold Greeson's available report which revealed, among other things, that the trial testimony of key prosecution witness Ira Bass had been far more detailed than Bass had recalled when he spoke to Mr. Greeson in February, 1976. [Pet. Exh. N]. In addition, counsel had not investigated the circumstances surrounding Bass' sentence commutation and disappearance after the guilt-innocence trial.

The evidence suggests strongly that Bass testified at least in part in return for the state's promise to try to arrange commutation of Bass' sentence. [See discussion at section V.G.1 infra]. Moreover, defense counsel had not obtained crime lab reports, available since the committal hearing, which indicated that no fingerprint tests had been performed on the murder weapons. None of this information was presented to the sentencing jury, who were urged by the state to place strong reliance on the testimony of Bass, the only witness who placed a murder weapon in petitioner's hand. In fact, defense counsel did not even object to the reading of Bass' testimony to the sentencing jury, a clear violation of petitioner's right to confrontation and cross-examination under the Sixth Amendment. Davis v. Alaska, 415 U.S. 308 (1974); Barber v. Page, 390 U.S. 719 (1968).

Petitioner did not receive at his sentencing trial the important constitutional protections recognized by this Court in Gregg, Lockett and Woodson, supra. As a result of counsel's ineffectiveness, petitioner was exposed to the real "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, supra, 438 U.S. at 605. It is abundantly clear that, "[w]hen the choice is between life and death, that risk is unacceptable and incompatible with the command of the Eighth and Fourteenth Amendments." Id.

Petitioner respectfully requests that this Court grant certiorari to correct the Eleventh Circuit's establishment of this improper precedent and an unconstitutionally low minimum standard for adjudging the performance of counsel in a capital death penalty case.

V. THE ELEVENTH CIRCUIT'S DECISION THAT IT COULD INFER JURY FINDINGS REQUIRED IN A CAPITAL DEATH PENALTY CASE BY ENMUND V. FLORIDA, 458 U.S. 782 (1982) WHERE SUCH FINDINGS HAD NOT BEEN MADE BY THE JURY PRESENTS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL; FAILS TO FOLLOW CONTROLLING PRECEDENT; AND RAISES A SIGNIFICANT ISSUE CONCERNING A CAPITAL DEFENDANT'S RIGHT TO DUE PROCESS OF LAW.

A. Introduction

Enmund v. Florida, 458 U.S. 782 (1982) mandates that before the death penalty may be imposed, it must be found that the defendant killed, attempted to kill, intended to kill or contemplated that lethal force would be used. The Fifth Circuit Court of Appeals has held in a series of recent cases that such a finding must be expressly made by the jury. Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984), cert. granted, Cabana v. Bullock, ____ U.S. ____, 105 S. Ct. 2110, 85 L. Ed. 2d 476 (1985); see Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3568 (Jan. 30, 1985) (No. 84-1237); Reddix v. Thigpen, 728 F.2d 705 (5th Cir.), cert. denied, ____ U.S. ____, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984). The Eleventh Circuit, however, in petitioner's case, and in at least one other recent case, [see Ross v. Kemp,

756 F.2d 1483 (11th Cir. 1985) (en banc)], has expressly rejected the Fifth Circuit's approach and has held that it can infer Enmund findings from the record. Petitioner submits that the Eleventh Circuit's analysis is incorrect. Furthermore, as shown below, if this Court concludes that the Fifth Circuit, and not the Eleventh Circuit, is correct on this issue, petitioner's death sentence must be vacated.

B. Enmund v. Florida Prohibits The Imposition Of The Death Penalty On An Individual Without A Finding That He Killed, Attempted To Kill, Intended To Kill, Or Contemplated That Lethal Force Would Be Used.

In Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), this Court held that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty upon an individual who did not kill, attempt to kill, intend to kill, or contemplate that lethal force would be used. Enmund drove a getaway car in a robbery during which his accomplices committed a murder. Holding that Enmund could not constitutionally be sentenced to death, this Court emphasized that "[t]he focus must be on [the defendant's] culpability,... for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" 458 U.S. at 798 (citations omitted).19/

19/ Georgia was one of only eight states noted by this Court that allow the imposition of the death penalty on

[Footnote Continued on Next Page]

C. Georgia State Law And Constitutional Due Process Require That The Enmund Findings Be Made By The Jury

Georgia law grants to a defendant charged with a capital offense a bifurcated trial to determine first the accused's guilt or innocence (the guilt phase) and then, if necessary, whether the sentence shall be life imprisonment or death (the sentencing phase). See O.C.G.A. §§ 17-10-30 and 17-10-31. By statute and as a matter of state constitutional due process, Georgia requires that all determinations of fact and of law at the guilt phase and at the sentencing phase be made by a jury. Ga. Const. 1976 Art. 1, Sec. 1, Par. 11 ("In criminal cases . . . the jury shall be the judges of the law and the facts."); O.C.G.A. § 17-9-2 ("The jury shall be the judges of the law and the facts in the trial of all criminal cases....").

To impose the death penalty in Georgia the state must prove that the defendant with malice aforethought caused the death of the victim or that the defendant in the commission of a felony caused the death of the victim. See O.C.G.A.

[Footnote Continued from Previous Page]

> defendants having Enmund's level of culpability. 458 U.S. at 789 n.5, 793 n.15. The Georgia capital sentencing statute under which petitioner was sentenced to death, Ga. Code Ann. § 27-2534.1 (now O.C.G.A. § 17-10-30), was singled out by this Court as a statute authorizing an impermissible death sentence. Id. at 789 n.5. To date, however, the General Assembly of Georgia has not amended this statute.

§§ 16-5-1(a),(b) and (c). These findings of fact must be made by the jury.[20/] The Enmund criteria place at issue related questions concerning the defendant's intent. Without question, intent is an issue of fact and not of law, and under Georgia law it is an issue for the jury.

D. Fundamental Due Process And The Rulings Of This Court Require That The Enmund Findings Be Made By The Jury

Fundamental due process as defined by this Court also requires that the Enmund findings be made by the jury. An essential component of the right to trial by jury is the requirement that a criminal defendant be convicted only upon a finding by the jury that he is guilty beyond a reasonable doubt

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20/ Georgia's bifurcated trial procedure in capital cases, requiring the jury to make all findings beyond a reasonable doubt, is materially similar to the procedure followed by Mississippi. See former Miss. Code Ann. § 99-19-101; § 99-19-103. In 1983, in the wake of Enmund, Mississippi amended its capital sentencing statute to make even more explicit the requirement that the Enmund findings be made by the jury. See Miss. Code Ann. § 99-19-101 (7)(1984). The new amendment was enacted by Mississippi shortly after two decisions by the United States District Court for the Southern District of Mississippi reversing death sentences imposed under the former statute in cases in which the juries had not been required to make Enmund findings. The Mississippi district court's conclusions on the Enmund issue were affirmed by the Fifth Circuit Court of Appeals. Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983), aff'd in part, rev'd in part and remanded, 741 F.2d 805 (5th Cir. 1984); Reddix v. Thigpen, 554 F. Supp. 1212 (S.D. Miss. 1983), aff'd in part, rev'd in part and remanded, 728 F.2d 705 (5th Cir. 1984).

of all elements of the crime with which he is charged. Sandstrom v. Montana, 442 U.S. 510, 520 (1979); Mullaney v. Wilbur, 421 U.S. 684 (1975). The Enmund elements, as constitutionally required prerequisites to a death penalty, are functionally equivalent to elements of the crime, and must also be found by the jury. See Ross v. Kemp, 756 F.2d 1483, 1496 (11th Cir. 1985) (Clark, J., concurring in part and dissenting in part) ("The determination of whether an accused is an 'Enmund type' defendant is a question of fact. The determination is identical to that of a jury decision of whether an accused is guilty of murder, voluntary manslaughter or involuntary manslaughter.").21/

This Court's decisions in capital punishment cases further support -- in fact, compel -- the conclusion that the Enmund findings must be made by a jury. In this Court's own words, the guiding principle underlying Furman v. Georgia, 408 U.S. 238 (1972), is that:

21/ The Enmund elements are critically different from statutory aggravating and mitigating circumstances, which may be found by a judge or jury. Although a state may call a crime capital murder without requiring any of the Enmund findings, it cannot impose a death penalty without such findings. In contrast, no particular aggravating circumstances must be present to allow the imposition of the death penalty, and there are no mitigating factors whose presence precludes it.

> [W]here discretion is afforded a sentencing body, on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 2741, 77 L. Ed. 2d 235 (1982). This Court's subsequent decisions reflect a resulting concern with the procedures by which the states impose the death penalty, and the safeguarding of any factor tnat will promote greater reliability in determining whether capital punishment is an appropriate sentence in a particular case. See, e.g., Spaziano v. Florida, ____ U.S. ____, 104 S. Ct. 3154, 82 L. Ed. 2d 340, 349 (1984); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 2958, 57 L. Ed. 2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944 (1976).

E. The Eleventh Circuit's Rulings That It Can Infer Enmund Findings, And Its Underlying Analysis Thereof, Are Incorrect.

It is abundantly clear that based upon Constitutional Due Process, the mandate of this Court and Georgia state law, Enmund findings must be made by the jury and cannot be inferred by an appellate court. Yet, the Eleventh Circuit in Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc), and in petitioner's own case has squarely rejected this approach. In Ross, the Eleventh Circuit stated:

> In our opinion, the question of whether the defendant's culpability satisfies the eighth amendment is sufficiently distinct from the question of the defendant's guilt that a specific jury finding is not constitutionally required.
>
> . . . .
>
> We see no reason why the Enmund inquiry need be characterized as an additional element that the state must prove to the jury beyond a reasonable doubt at the guilt or sentencing phase before the death penalty lawfully can be imposed, so long as a reviewing court can determine from the record that the eighth amendment has been satisfied.
>
> . . . .

756 F.2d at 1488.

In petitioner's case, the Eleventh Circuit expressly held:

> Edmund (sic) does not require an explicit finding by the sentencer (court or jury) that the defendant "kill[ed], attempt[ed] to kill, or intend[ed] that a killing take place or that lethal force be employed" before the death penalty can be imposed.

748 F.2d at 1453.

The Eleventh Circuit further stated in petitioner's case:

> If the jury received the case under instructions that would authorize it to base guilt on malice murder or felony murder or conspiratorial murder, then, in order to sustain the death penalty, we must determine whether the theory under which the parties argued the case to the jury and the proof were such that we can safely say that the jury found the defendant guilty of malice murder.

Id. (emphasis added). Thereafter, the court examined the

parties' arguments to the jury and the evidence, and concluded, based on its own analysis and inferences, that "it did not lead the jury to impose an unlawful sentence." Id. at 1454.

The Eleventh Circuit is incorrect in its conclusion that it may substitute its own inferences from the record as to a defendant's culpability and intentions for the findings of a jury. The court's conclusion that it can properly draw such inferences follows from its erroneous belief that Enmund does not address due process concerns and merely requires an individual proportionality review. On that subject the Eleventh Circuit has opined as follows:

> The necessity of ensuring that the jury finds every element of the crime beyond a reasonable doubt focuses on procedural due process concerns . . . whereas the proportionality review mandated by Enmund is aimed at ensuring that imposition of the death penalty is not excessive in light of the defendant's culpability.

Ross v. Kemp, 756 F. 2d at 1488.

Judge Clark, dissenting from the majority's analysis of the Enmund issue in Ross, correctly observed that the majority fundamentally misunderstood the principle of proportionality review. Id. at 1495-96. In Enmund, this Court conducted an analysis of the proportionality of the death penalty as applied to defendants of varying degrees of culpability: those who actually killed, attempted to kill, or intended that a killing would take place or that lethal force would be employed, and

those who did not have an intent to kill. The Court concluded that for an entire class of defendants -- those having a degree of culpability commensurate with a lack of intent -- the death penalty is inherently too severe, i.e., is constitutionally disproportionate.

The Eleventh Circuit confuses the inherent proportionality review that was conclusively conducted by this Court in Enmund, which does not lend itself properly to re-evaluation on an ad hoc basis by the federal appellate courts, with the second type of proportionality review, wherein the appellate court compares the proportionality of a sentence imposed on one defendant with sentences imposed on other defendants convicted of the same crime. The latter, unlike the former, is within the province of an appellate court and does not in any way require the court to substitute its own analysis of the evidence for the jury's analysis. See Pulley v. Harris, ____ U.S. ____, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). Comparative proportionality review, however, is not what the Eleventh Circuit suggests in this case.

The Enmund findings as to the extent of a defendant's guilt are, in short, closely akin to the elements of a crime, and, contrary to the Eleventh Circuit's conclusion, constitutionally require the decision of a jury and not merely that of a reviewing court. This Court has made it clear that

evidence in the record is no substitute for a required finding by the jury.

> No matter how clear the evidence, [the defendants] are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. To repeat, guilt is determined by the jury, not the court.

United Brotherhood of Carpenters v. United States, 330 U.S. 395, 410 (1947) (emphasis added).

> In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> . . .
>
> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance ....

Bollenbach v. United States, 326 U.S. 607, 614-615 (1946) (emphasis added).

F. The Eleventh Circuit's Rulings That It Can Infer Enmund Findings Are In Direct Conflict With The Decisions of Other Circuit Courts of Appeals.

The Fifth Circuit Court of Appeals, a court in which a very large percentage of the federal habeas corpus claims in capital cases have been presented in recent years, has held that a new sentencing hearing must be granted where the jury was not required to make the specific findings of culpability and intent called for by Enmund. This Court has granted certiorari in the most recent of the series of Fifth Circuit cases concerning Enmund. Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984), cert. granted, Cabana v. Bullock, ____ U.S. ____, 105 S. Ct. 2110, 85 L. Ed. 2d 476 (1985); see Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3568 (Jan. 30, 1985) (No. 84-1237); Reddix v. Thigpen, 728 F.2d 705 (5th Cir.), cert. denied, ____ U.S. ____, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984). Indeed, out of all of the post-Enmund cases in which Enmund challenges have been addressed by the federal circuit courts of appeal, it appears that only the Eleventh Circuit has rejected an Enmund attack where the jury had not been required to make Enmund findings. See, e.g., Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) and petitioner's own case, Fleming v. Kemp, 748 F.2d 1435 (11th Cir. 1984).

Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari on the issue of whether Enmund findings may be inferred from the record because the Eleventh Circuit's ruling is incorrect and in direct conflict with the decisions of other circuit courts of appeal. As shown below, if, as petitioner believes, the Eleventh Circuit's approach to this issue is constitutionally improper, petitioner's death sentence must be vacated.[22/]

G. Petitioner's Death Sentence On An Unexplained General Verdict Must Be Vacated Because The Jury Instructions Permitted The Imposition Of The Death Penalty Without A Specific Finding That Petitioner Killed, Attempted To Kill, Intended To Kill, Or Contemplated That Lethal Force Would Be Used.

1. The Jury Instructions Did Not Require Specific Enmund Findings And Improperly Permitted The Imposition Of The Death Penalty Without A Finding Of "Enmund Type" Culpability.

The juries that convicted and sentenced petitioner did not specifically find that petitioner killed, intended to kill, attempted to kill, or contemplated that lethal force would be used. The Eighth and Fourteenth Amendments require at a minimum that before this irreversible penalty is imposed upon

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22/ Petitioner respectfully submits that even if this Court determines that certiorari is not appropriate in petitioner's case, execution should, at a minimum, be stayed pending this Court's review of Cabana v. Bullock, cert. granted, ____ U.S. ____, 105 S. Ct. 2110, 84 L. Ed. 2d 331 (1985).

petitioner, a jury, not an appellate court, must make a finding that he is "death eligible" under Enmund. The Eleventh Circuit below did not dispute the absence of such an express finding by the jury. Instead, the Eleventh Circuit improperly inferred such findings.

Although petitioner was indicted for malice murder, he was convicted on a general verdict of guilty on the basis of instructions that permitted conviction for felony murder or for conspiratorial liability without a showing of intent. At the conclusion of the evidence and arguments in the guilt phase, the trial court charged the jury as follows on the Georgia law on murder:

> Now, the charge here is murder. Now, a person commits murder when he unlawfully, and with malice aforethought, either express or implied, causes the death of another human being.
>
> Now, express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifest by external circumstances capable of proof. Now, malice shall be implied where no considerable provocation appears, and where all of the circumstances of the killing show an abandoned and malignant heart.
>
> Now, a person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> Now, before you would be authorized to find the Defendant guilty of the offense of murder, you must find and believe beyond a reasonable doubt that the Defendant did, with malice aforethought, either express or

> implied, cause the death of James Edward Giddens.
>
> And, I charge you that if you find and believe that at any time prior to the date this Indictment was returned into this court, that the Defendant did, in the County of Lanier, State of Georgia, with malice aforethought, kill and murder James Edward Giddens in the way and manner set forth in the Indictment, then you would be authorized to find the Defendant guilty of murder.

[Resp. Exh. I, Vol. VI, p. 573 (emphasis added)]. The trial court also charged the jury on conspiratorial liability:

> [W]hen individuals associate themselves together to do an unlawful act or acts, any act done in pursuance of that association by any one of the individuals to conspiracy, would, in legal contemplation, be the act of each of them.
>
> Where a conspiracy is shown the act of one becomes the act of all insofar as the furtherance of the conspiracy is concerned, and each is as fully responsible for the act of the other in carrying out the common purpose as if he, himself, had committed the act.

[Id. at 518 (emphasis added)].

Moreover, the prosecution's opening statements and closing arguments to the jury were replete with ambiguous references to conspiratorial liability. For example, during his opening statement at the guilt-innocence trial, prosecutor Neugent stated:

> Now, the Judge, ultimately, will give you the law as it applies to conspiracy. The act of one is the act of all. And, you will be concerned about that, because what one did the other is guilty of. If me and one other person kidnapped a person and killed him and if I'm just driving the car or if I'm pulling the trigger, or whatever, both of us are guilty just like the other.

[Resp. Exn. 1, Vol. III, First Trial Tr., p. 14 (emphasis added)].

During closing argument at the guilt-innocence trial, Mr. Neugent argued:

> [W]hat Larry Fleming did, Son Fleming did. What Henry Willis did, Son Fleming did. What Son Fleming did, Henry Willis and Larry Donnell Fleming did. That is the law.

[Id. at 34].

And during closing argument at the sentencing trial, the prosecutor again argued that:

> [W]henever one or more people get together and do things the act of one is the act of all under the law. And, whatever Henry Willis did, Son Fleming did. Whatever Larry Donnell Fleming did, Henry Willis did and Son Fleming did. He is chargeable with that. Whatever they did and wnatever he did, everyone of them did under the law.

[Id., Second Penalty Trial Tr., p. 425].

The aforesaid jury charges, statements and prosecutorial arguments at petitioner's trials must also be viewed in light of the fact that there was substantial inconsistent testimony regarding petitioner's culpability. Only two of the three

co-defendants were triggermen. Henry Willis admitted to the shooting. Larry Fleming and petitioner each accused the other. Petitioner, however, has consistently maintained that he did not participate in the killing [see, e.g., Resp. Exh. 1, Vol VI, pp. 348, 432, 436, 448, 451, 457, 495; Vol II, pp. 253, 262] and there is substantial evidence in the record to that effect. Id. On the other hand, the only evidence whatsoever that petitioner had any involvement in the murder, or any intent to kill, was the extremely suspect testimony of Ira Bass, a convicted child molester, who was in the Cook County jail at the same time as petitioner. Petitioner supposedly confessed the crime to Mr. Bass during their brief confinement together in the county jail. However, petitioner denies having ever spoken with Mr. Bass.[23/] Mr. Bass testified against petitioner at the guilt-innocence trial. Immediately thereafter, at the urging and written request of the district attorney, [see Pet. Exhs. P, Q, R, S and T; RA Vol. 5, p. 31], his sentence for child molestation was commuted. Mr. Bass subsequently disappeared. His testimony was read to the jury and he was not available for cross-examination at the second sentencing trial. Efforts to find him have been unsuccessful.

23/ During Mr. Bass' confinement in the county jail, he spoke with law enforcement officers on several occassions and also had access to newspapers. It is entirely possible that Mr. Bass obtained his "information" from sources other than petitioner.

The circuit court below dismissed the court's "erroneous reference to felony murder" as "mere harmless surplusage." 748 F.2d at 1454. The court also found that the conspiracy instruction did not violate Enmund since it concluded that the "common purpose" implicit in that instruction was malice murder. Id. The Eleventh Circuit concluded that the jury instructions at petitioner's guilt-innocence trial did not violate Enmund because, in its view, they could not have authorized a verdict inconsistent with Enmund. Id. at 43.

The critical question, however, is not what the appellate court, with the benefit of educated hindsight, declares the charge to mean but rather the meaning that a reasonable juror could have ascribed to it. See Francis v. Franklin, U.S. , 105 S. Ct. 1965 (1985). In the factual context of this case the jury might easily have become confused by the reference to murder during the commission of a felony. The prosecution argued that petitioner committed murder while engaged in the commission of another felony -- kidnapping with the intent to commit bodily injury -- and later at the sentencing trial the prosecution emphasized that accusation as an example of an "aggravating circumstance." [See Resp. Exh. 1, Vol. III, Second Sentencing Trial, p. 467.]. Moreover, while the jury was clearly aware that petitioner was then on trial only for murder, they were repeatedly reminded that

petitioner and his co-defendants had allegedly committed the murder while engaged in a continuous spree of robbery, kidnapping and murder. It would not have been unreasonable for the jury to conclude on the basis of the trial court's ambiguous and uncorrected reference to felony murder that that principle applied to petitioner's case.

Similarly, the trial court's and the prosecution's references to conspiratorial liability cannot be so summarily dismissed. It may be that the jury assumed that the "common purpose" referred to was murder; it may plausibly also be that the jury equated "common purpose" with some more nebulous, all-encompassing plan among the co-defendants to commit a robbery, flee and obscure their actions. The latter would be entirely consistent with the repeated emphasis at trial upon a "crime spree". But if this kind of "common purpose" were contemplated, the jury could easily have found conspiratorial liability under the court's instructions without finding that petitioner's culpability in the murder approached the Enmund threshold. See Clark v. Louisiana State Penitentiary, 694 F. 2d 75 (5th Cir. 1982), wherein the court found the jury instructions fatally ambiguous even though "the trial judge instructed the jurors on several occasions that they could not find Clark guilty of first degree murder unless they found that he had the specific intent to kill or inflict great bodily

harm." Id. at 77. Despite these instructions, the court in Clark held that reversal was necessary because of a conspiracy instruction that "may have" misled the jury into believing that if Clark had conspired to rob then "guilt and intent [might also attach] to a co-conspirator's act of murder." Id. at 78.

Construing the jury instructions as the Eleventh Circuit has done -- to support nothing but a verdict of malice murder -- would avoid the constitutional infirmities associated with the Enmund requirements. That construction, however, simply is not proper where, as here, the instructions arguably submitted the case to the jury on one or more unconstitutional grounds.

It is well established that where jury instructions are silent on an essential element of a crime, reversal is required. In United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947), for example, this Court reversed convictions because the jury had not been charged on all of the elements necessary to hold an organization criminally liable.

> No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under § 6 of such association or organization for acts of its agents. For a judge may not direct a verdict of guilty no matter how conclusive the evidence .... A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction.

Id. at 408-409 (emphasis added; footnotes omitted).

Even where the jury instructions are merely ambiguous on an essential element, reversal is required.

> We are asked to sustain the conviction on the assumption that the jury was properly guided. The Government contends that the court below failed to appreciate several factors in regard to the criticized charge. What reason is there for assuming that the jury did not also fail to appreciate these factors ...? A conviction ought not to rest on an equivocal direction to the jury on a basic issue.

Bollenbach v. United States, 326 U.S. 607, 613 (1946) (emphasis added). Accord, Sandstrom v. Montana, 442 U.S. 510, 526 (1979) (Conviction reversed: "Even if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they did do.").

Enmund is consistent with these established principles. Because petitioner was sentenced to death by a jury that was not required to make the Enmund findings, his death sentence must be vacated.

2. The Eleventh Circuit Acted Incorrectly In Inferring Findings Required By Enmund That Had Not Been Made By The Jury.

As previously noted, in this case and in the recent case of Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc), the Eleventh Circuit Court of Appeals expressly rejected the conclusion reached by the Fifth Circuit Court of Appeals that

Enmund requires specific jury findings on a capital defendant's culpability and that the Enmund findings cannot be supplied in the first instance by an appellate court on review.

In petitioner's case, based on this erroneous ruling, the court proceeded to examine the parties' arguments to the jury and the evidence. The Eleventh Circuit concluded, based on its own analysis and inferences, that "it did not lead the jury to impose an unlawful sentence." Id. at 1454.

Thus, petitioner's death sentence on an unexplained general verdict was imposed on the basis of jury instructions that might reasonably have allowed a finding inconsistent with Enmund. It is impossible to ascertain from the record whether the jury found petitioner to be "death eligible" under Enmund, and it is not properly within the power of the Eleventh Circuit to make its own de novo Enmund findings based on inferences from the record. Petitioner therefore submits that a writ of certiorari should be granted and his death sentence vacated.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel of record for respondent with the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by having a copy thereof hand delivered to Mary Beth Westmoreland, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 10th day of September, 1985.

Kenneth A. Shapiro

Kenneth A. Shapiro

Counsel for Petitioner